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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WALLACE WOOTEN,
INDIVIDUALLY AND AS FATHER AND NEXT FRIEND OF
AUGUST MARK WOOTEN, A MINOR,

Petitioner,

v.

AMERICAN MOTORISTS INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Is the wrongful death remedy announced in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970), applied only where there exists a breach of the warranty of seaworthiness or is it also available in cases involving negligence, especially negligence unconnected with the operation of a vessel?

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PARTIES

The petitioner was the original defendant in the trial court. The Respondent was his homeowner's insurer who was originally named as an additional defendant, but against whom the petitioner cross-claimed to establish insurance coverage.

OPINION BELOW

The pertinent decision of the District Court is neither officially nor unofficially reported and is made a part of the appendix hereof; the opinion of the Court of Appeals, reported at 681 F.2d 712, is similarly made a part of the appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered as judgment on July 26, 1982. This Court's jurisdiction is invoked under 28 United States Code § 1254(1).

STATEMENT OF THE CASE

In this wrongful death action, the deceased, a seventeen-year-old, died while on a summer sailing trip to the Bahamas. The deceased, his seventeen-year-old friend, and his friend's father, the owner of the yacht, left Ft. Lauderdale and sailed to the Island of Abaco. At Marsh Harbour, Abaco, the owner left the yacht in the custody of the deceased and his son and returned to the United States. The arrangement was that the boys would sail the boat south to Nassau where they would all meet again. The boys continued south to Little Harbour where they anchored and went by dinghy with new acquaintances to dive for lobster in a deep hole. The deceased was able to free dive several times to a depth of about forty-five feet, but drowned as a result of a syndrome known as "shallow water black-out" brought on in part by excessive hyperventilation just before diving.

Suit was brought in admiralty under the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. § 761, and against

the homeowner's policy for personal negligence. At the Pre-trial Conference, the plaintiff was permitted to amend his complaint to include a cause of action under general maritime law for "loss of society damages". The defendant, the petitioner here, cross-claimed against his homeowner's insurance company, the respondent here, which was named as a party defendant in the case under Florida procedure. The deceased was found to be a member of the crew but the case was not prosecuted as a Jones Act case and, in his Findings of Fact, the trial judge further found coverage under the homeowner's policy to the extent of the pecuniary damages. He went on to find that that same negligence produced a condition of unseaworthiness in the vessel for which he awarded "loss of society damages" which he found to be not covered by the homeowner's policy because of the policy exclusion of vessels of that size.

Two appeals were subsequently taken. In the first, the Fifth Circuit remanded the cause to the District Court for trial on the issue of coverage, and the second was taken by the defendant from an adverse summary judgment on the issue of coverage. The petitioner contended that the homeowner's policy covered personal negligence unconnected with the operation of a vessel, and if an award of "loss of society damages" flowed from that same negligence then those damages should be covered by the policy.

The case was tried in those years between *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806 (1973), *rehearing denied*, 415 U.S. 986 (1974), and *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 617, 56 L. Ed. 2d 339, 98 S. Ct. 2010. At that time, it was widely assumed that the remedy announced in *Moragne, supra*, had no territorial bounds. Although the death

occurred in Bahamian waters, it was tried as if *Moragne* applied to it and that assumption must now be considered the law of the case.

REASONS FOR GRANTING WRIT OF CERTIORARI

In this case, the Eleventh Circuit Court of Appeals held that the wrongful death remedy announced in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970), could be invoked only as a consequence of breaches of the warranty of seaworthiness and could not be applied in causes of action for negligence. That conclusion is logically inconsistent with all of the cases that have followed *Moragne, supra,* and should be addressed by certiorari to this Court.

It is, first, mildly inconsistent that *Moragne, supra,* could be understood or construed as having announced a wrongful death remedy which would have nothing to do with negligence. The specific question addressed in *Moragne* was whether there was a wrongful death action under general maritime law which encompassed unseaworthiness as a theory of liability. The answer was yes. But *Moragne* should be logically understood to include a wrongful death action brought either upon unseaworthiness or negligence.

The Eleventh Circuit relied on the case of *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979), *cert. denied,* 446 U.S. 956, 100 S. Ct. 2927, 64 L. Ed. 2d 815 (1980), but *Ivy, supra,* is distinguishable because it involved the death of a Jones Act seaman. If *Ivy* did apply, it would, perhaps, be not so mildly inconsistent that the shipowner would escape nonpecuniary damages in admiralty if he is found to be positively negligent that

damages would be awarded if his ship is found to be unseaworthy when a Jones Act seaman dies in territorial waters. But *Ivy* does not stand for the proposition that there is no wrongful death remedy for negligence, it merely states that if the decedent is a Jones Act seaman, then the wrongful death provisions of the Jones Act, 41 Stat. 1007, 46 U.S.C. § 588, must be applied. The Jones Act is limited to specific beneficiaries of a specific class of decedents.

The ultimate question is whether *Moragne* creates a wrongful death action which is restricted to unseaworthiness and does not encompass negligence as a theory of recovery. A reading of the case will not permit that construction. The first half of the opinion is devoted to a historical discussion of the emergence of wrongful death remedies. In overruling *The Harrisburg*, 119 U.S. 199, 30 L. Ed. 358, 7 S. Ct. 140 (1886), this Court was establishing a remedy for wrongful death. That remedy was so extensive that it encompassed unseaworthiness as a theory of liability, but the import of the decision was that a right of action for wrongful death, in the tradition of the emergence of such actions, was established under general maritime law.

The fact that *Moragne* views the right of action in this broad and complete way can be seen in references througout the opinion, but at 398 U.S. 399 one can find the following language relating to the conceptual relationship of negligence to unseaworthiness:

> Nonseamen on the high seas could generally recover for ordinary negligence, but even this was virtually denied to seamen under the peculiar maritime doctrine of *The Osceola*, 189 U.S. 158, 47 L. Ed. 760, 23 S. Ct. 483 (1903).

Simply stated, there is not one suggestion in *Moragne* that the maritime duties alluded to do not embrace negligence as a cause of action under this remedy. See the holding at 398 U.S. 409:

> We accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties.

Moragne has been so understood since. *See Law v. Sea Drilling Corporation*, 523 F.2d 793 (5th Cir. 1975), quoting the understanding of Gilmore & Black, *The Law of Admiralty* (2d ed. 1975), pages 369-70:

> The remedy provides recovery for deaths caused by negligence as well as unseaworthiness although in the latter case the decedent must have been a person (*e.g.*, a Jones Act seaman) entitled to the warranty of seaworthiness.

The Court in *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980), a case dealing primarily with distribution of the risk of injury to workmen between the government and its contractors, also clearly understood *Moragne* to apply in cases of negligence. See the opinion at page 473:

> We hold that the need for uniformity in maritime wrongful death actions requires extension of *Moragne* to cover claims based on negligence, to the exclusion of state wrongful death statutes.

Nothing in the case of *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 617, 56 L. Ed. 2d 339, 98 S. Ct. 2010 (1978), is contrary to the proposition advanced here. In fact, *Higginbotham* is in support of the petitioner's view. In that case, loss of society damages were denied to nonseamen injured in the crash of a helicopter solely because the accident occurred outside the territorial waters of the United States and, therefore, were

specifically encompassed under the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. § 761.

There is nothing in *Higginbotham* to suggest that, had the accident occurred within the three mile limit, "loss of society damages" would not have been upheld under *Moragne* for negligence unconnected with the operation of a vessel. *Higginbotham* settled the issue as to the territorial nature of the *Moragne* remedy, but the place of the death in this case, for our purposes now, is of no consequence.

There is a great need for uniformity in this area; it simply does not occur by itself, it must be forged. Traditional maritime activity is not just limited to seamen and vessels. It now involves helicopters and seaplanes and thousands of over the water flights per day, divers and men at work on wave suppressors and in caissons. Admiralty, after *Moragne*, no longer adopts widely varying state wrongful death statutes. For the sake of uniformity, which is essential to justice, all doubt should be removed about the basis of recovery under this new wrongful death remedy. It is as remedy for wrongful death for breaches of maritime duties, including negligence and unseaworthiness, that applies within territorial waters.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-5959

MARGARET W. FORD,
as Administratrix & Personal Representative of
Estate of James Edward Ford, Deceased, *et al.*,
Plaintiffs,

v.

WALLACE WOOTEN,
Individually and as father and next friend of
August Mark Wooten, a minor,
Defendant/Third-Party Plaintiff/Appellant,

v.

AMERICAN MOTORISTS INSURANCE COMPANY,
Defendant/Third-Party Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

July 26, 1982

Before *Godbold,* Chief Judge, *Anderson,* Circuit Judge, and *Hoffman**, District Judge.

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* Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

WALTER E. HOFFMAN, District Judge:

This case comes before us on Wallace Wooten's appeal from the entry of summary judgment against him on his amended cross-claim against American Motorists Insurance Company (hereinafter American). The issue presented by the cross-claim is one of coverage under a homeowners insurance policy issued to Wooten by American. The original plaintiff, Margaret Ford, is not a party to this appeal; nor was she a party to the former appeal referred to *infra*.

Margaret Ford brought this action to recover for the death of her 17-year old son, James Edward Ford. At the time of his death, James Ford was a guest on a boat owned by Wallace Wooten. The decedent had accompanied Wooten and his 16-year old son, Mark, on a sailing trip to the Bahamas. During that trip, Wallace Wooten returned to Fort Lauderdale for personal reasons, leaving the boat under the control of the two boys, who apparently were good sailors. Subsequently, while skin-diving away from the sailing vessel, near the Bahamas, James Ford drowned.

Margaret Ford originally brought this action for wrongful death under the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-767. The trial court later permitted plaintiff to amend her complaint by adding a claim under general maritime law for loss of society. Florida's direct action statute permitted Ford to sue American in the same suit. Count I alleged a cause of action in negligence under DOHSA. Count II alleged a cause of action of general maritime law under DOHSA. Thereafter, Wooten attempted to file a cross-claim against American in order to determine coverage under the homeowners insurance policy. Because of the untimeliness of the cross-claim, however, the district court

struck it and indicated that the coverage issue should be determined in a separate action.

After a non-jury trial, the trial judge dictated his findings of fact and conclusions of law into the record. On the claim under general maritime law, the court found that the unseaworthiness of Wooten's vessel due to the inadequacy or incompetence of the crew was a contributing cause of Ford's death. The court found the damages under this claim to be $24,877 for pecuniary loss, $50,000 for loss of society, and $780.13 for funeral expenses. These amounts were reduced by fifty percent, however, because of the decedent's contributory negligence. As to plaintiff's DOHSA claim, the court found that Wallace Wooten's negligence in leaving his son and James Ford without adequate supervision was a contributing cause of Ford's death. The court further found the pecuniary damages to be $24,877, which sum also was reduced by fifty percent due to decedent's contributory negligence.

Despite having struck Wooten's cross-claim, the trial court did address the insurance coverage issue in an attempt to facilitate later application of the coverage solution to the judgment already rendered. Noting that Wooten's homeowners policy contained an exclusion for any claims "arising out of ownership, maintenance, operation, use, loading or unloading of any watercraft: (1) owned by or rented to any insured if the watercraft . . . is a sailing craft . . . 26 feet or more in overall length," the Court correctly found that Wooten's vessel was longer than 26 feet. The court then concluded that, because Ford's general maritime claim depended on the unseaworthy condition of the boat, the claim arose from ownership of the vessel, thus falling within the policy exclusion. As to Ford's DOHSA claim, however, the

court found the exclusion inapplicable because the action was grounded on Wooten's negligence applicable to a situation away from the sailing vessel, rather than unseaworthiness. Accordingly, judgment was entered against American only for the $12,438.50 awarded on the DOHSA claim. Against Wallace Wooten, judgment was entered for the full $37,828.56.

An appeal brought by Wooten was subsequently dismissed by a panel of the old Fifth Circuit. *Ford v. Wooten,* 549 F.2d 201 (5th Cir. 1977) (unpublished). That court held that any argument concerning the $12,438.50 judgment against American had been mooted by American's intervening payment of the judgment. As to the remainder of the judgment against Wooten, however, the court concluded that the district court had erred in striking the cross-claim that would have determined the coverage issue, perhaps because without the cross-claim there was a serious question as to Wooten's standing to appeal. Therefore, the Court of Appeals remanded the case for final determination on questions of coverage.

On remand, the district court granted American's motion for summary judgment on the amended cross-claim, stating:

> The Amended Cross-claim involved herein stems from Count Two of the Complaint, where [*sic*] is clearly based upon Plaintiff's unseaworthiness claim for recovery against Defendant, Cross-Plaintiff WALLACE WOOTEN. This is so reflected in the trial judge's findings of fact and conclusions of law, which were not challenged upon appeal to the United States Court of Appeals for the Fifth Circuit. Under the unseaworthiness doctrine, underlying negligence is not the basis of liability. It thereupon appears that the American Motorists Insurance

> Company personal liability insurance policy exclusion for any claims arising out of the Defendant WALLACE WOOTEN's ownership, maintenance, operation or use of a sailboat more than 26 feet in length applies to this matter and precludes coverage herein.

We agree with the conclusion of the district court and accordingly affirm.

The damages awarded by the district court in this action are of two types: (1) damages for pecuniary loss, which are recoverable under both DOHSA and general maritime law; and (2) damages for loss of society and funeral expenses, which may be recovered only under general maritime law. American has paid the judgment for pecuniary loss to plaintiff. Therefore, only the damages for loss of society and funeral expenses are at issue here.

Before proceeding further, we note the unique procedural posture of this case. After the district court awarded damages and after the decision of the old Fifth Circuit, the Supreme Court handed down its decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978). That case held that damages for loss of society may not be recovered under general maritime law in suits to which DOHSA is also applicable. Thus, the damages awarded by the trial court for loss of society could not now be awarded if this case were to be tried again. That issue is not presented here, however; the original plaintiff is not even before this court. The propriety of the damage awards in this suit was finally determined by the trial court and was not disputed on appeal to the old Fifth Circuit. Therefore, we are now faced only with the issue of insurance coverage of the damages previously awarded.

Under the terms of Wooten's insurance policy, damages arising from the ownership or operation of his boat were not covered by the insurer. The trial court concluded that Wallace Wooten's negligence in leaving the two boys without adequate supervision did not arise from ownership or operation of the vessel, but that the unseaworthy condition did. Appellant's sole contention is that plaintiff's claim under general maritime law was not restricted to a claim of unseaworthiness, but encompassed negligence as well. Wooten argues that, as a matter of law, the district court erred in concluding that the general maritime law only permits an action for wrongful death based on an unseaworthiness theory.

We question whether an issue concerning the theoretical basis for the judgment entered between Wooten and the original plaintiff is now before us. The remand from the old Fifth Circuit was for "further proceedings and for entry of a final judgment on questions of coverage between Wooten and American Motorists."[1] Even

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[1] The express wording of the Fifth Circuit's unpublished opinion seems to restrict the issues on remand to a determination of insurance coverage for the damages awarded to the plaintiff. Arguably, however, that opinion should be more broadly interpreted in light of Wooten's argument on his first appeal. In the conclusion to his opening brief in that appeal, he stated:

> The Trial Judge erred in not finding that the negligence he found under the DOHSA, covered by the COMPANY, was also encompassed by the MORAGNE REMEDY. Judgment should have been given against the COMPANY for damages for loss of society as well as pecuniary damages.

Thus, in seeking a determination of the coverage question, Wooten indicated that the issue of the theoretical basis for the recovery was interwoven with the coverage question. The short opinion of the Fifth Circuit did not specify whether the additional issue of the basis for recovery should be treated as part of the coverage question on remand. Our hesitancy to consider the basis for

[footnote continued]

assuming that the underlying theoretical questions are presented, we are not able to agree with Wooten's contentions. In asserting that the trial court erred in concluding that general maritime law only permits an action for wrongful death that is caused by unseaworthiness, appellant relies on the following language from the findings that the court dictated into the record.

> Because the general maritime recovery hinges upon the condition of the vessel itself, that is, the unseaworthiness of the PHYTARUS, this Court finds that the plaintiffs' general maritime claim is a claim arising out of the ownership of a sailing vessel 26 feet or more in length and, therefore, is a claim which is excluded under the policy of insurance.

We are not totally convinced that this language does indicate, as appellant contends, that the trial court concluded *as a matter of law* that only unseaworthiness supports a recovery for wrongful death under general maritime law. The court's oral findings are susceptible to an alternative interpretation—the court may have found that the *facts* of this case did not support a general maritime law recovery for wrongful death caused by negligence.[2]

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recovery in the absence of the plaintiff would be significantly lessened by the fact that the total amount recovered by the plaintiff would not be affected by a determination of the theoretical basis for that recovery. At oral argument, we were told that Wooten had paid the judgment against him, less a credit for the amount paid by American under the judgment entered on Count I.

[2] Appellant has argued that the trial court's finding of negligence, which was made in the DOHSA context, is equally applicable to the general maritime claim. Although we do not decide the issue, we have reservations about the validity of this proposition. First, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970), which established a cause of

[footnote continued]

Even if we assume that the district court did conclude as a matter of law that general maritime law permits a recovery for wrongful death only on the basis of unseaworthiness, we do not believe that conclusion to be erroneous. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970), first established a cause of action under general maritime law for wrongful death due to breach of maritime duties. In that case, plaintiff had made claims under both negligence and unseaworthiness theories, but the trial court dismissed the unseaworthiness claim. Thus, the Supreme Court's opinion, which mentioned unseaworthiness but never expressly discussed negligence, pertained only to an unseaworthiness claim. Moreover, subsequent Supreme Court cases have indicated that *Moragne* applied the wrongful death remedy only where death resulted from unseaworthiness. *See, e.g., Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 574, 94 S. Ct. 806, 809, 39 L. Ed. 2d 9 (1974).

The question we consider, then, is whether *Moragne* should be extended to permit recovery under general maritime law for wrongful death caused by negligence. *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979) (en banc), *cert. denied*, 446 U.S. 956, 100 S. Ct.

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action under general maritime law for wrongful death, specified that the action was for "death caused by violation of maritime duties." *Id.* at 409. We are not certain that the negligence found by the trial court in this case—leaving the boys on board the boat without adequate supervision or limitations on their activities—is a breach of a *maritime* duty. Second, *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972), indicates that admiralty jurisdiction, as indicated by the relationship of a tort to "traditional maritime activity," may be broader under DOHSA than in other contexts. *Id.* at 262-64, 271 & n.20, 93 S. Ct. 501-02, 506 & n.20.

2927, 64 L. Ed. 2d 815 (1980), considered this exact question, but in a slightly different context. Therein, the Court of Appeals determined the applicability of a general maritime law remedy for negligently induced wrongful death where a cause of action for negligence also exists under the Jones Act, 46 U.S.C. § 688. The court concluded:

> *Moragne* did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness. The suggestion that the Jones Act measure of damages can be *supplemented* by the *Moragne*-cause-of-action-*Gaudet*-damages rule will not bear analysis; that hybrid could be spawned in but one context, the coupling of unseaworthiness (capable of producing *Gaudet*) with a Jones Act claim to give birth to Jones Act damages for negligence. To consider the *Moragne-Gaudet* result a supplemental remedy to the Jones Act when the suit is for negligence only is not to supplement the statute but to alter the interpretation it has continuously received.

606 F.2d at 527 (footnote omitted). We consider *Ivy* highly persuasive, and see no reason to distinguish it simply because it related to the interaction of the Jones Act with general maritime law, whereas the present case relates to the interaction of DOHSA with general maritime law. As with the Jones Act, "supplementation" of DOHSA's pecuniary loss remedy with the *Moragne* loss-of-society remedy would totally alter the remedial scheme, which already provides a cause of action for death due to negligence. In fact, this logic provided the basis for the holding in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978).[3]

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[3] We do not rely on *Higginbotham*'s holding because of the procedural stance of this case. *Higginbotham* held that no general

[footnote continued]

The only other case that we have found which discusses the possibility of an action under general maritime law for wrongful death caused by negligence is *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980).[4] That court held that "the need for uniformity in maritime wrongful death actions requires extension of *Moragne* to cover claims based on negligence, to the exclusion of state wrongful death statutes." *Id.* at 473. We recognize that such extension of the *Moragne* remedy would ensure uniformity that otherwise would not exist in those wrongful death cases that fall outside of DOHSA and the Jones Act. As indicated by *Ivy*, however, such application of the *Moragne* remedy creates inconsistency with those two federal statutes. At least where statutory remedies exist, we deem consistency with the federal remedial schemes to be more important than the some-

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maritime law damages are available, even under an unseaworthiness theory, where DOHSA is also applicable. In this case, however, a final judgment was rendered under general maritime law for death due to unseaworthiness, and the validity of that damage award is not in issue here. We hesitate to apply *Higginbotham* now to preclude only general maritime damages caused by negligence. Moreover, if the trial court originally had permitted Wooten's cross-claim, as the Fifth Circuit ruled should have been done, *Higginbotham* would have come down too late to affect this decision. In light of these anomalies, we do not simply apply *Higginbotham*; rather, we rely on *Ivy*, which specifically held that wrongful death due to *negligence* was not even actionable under general maritime law.

[4] Certain language in *Law v. Sea Drilling Corp.*, 523 F.2d 793 (5th Cir. 1975), cited by appellant, does suggest that wrongful death caused by negligence is actionable under *Moragne*. *See id.* at 796. That language, however, lies within an extensive quotation from Gilmore & Black's *The Law of Admiralty*, which the court cited for an entirely different proposition. Therefore, we do not consider *Law* to have adopted Gilmore & Black's unsubstantiated assertion that negligence is actionable under *Moragne*.

what limited loss of uniformity. Therefore, we hold that where a cause of action exists for wrongful death under DOHSA, no additional action exists under general maritime law for wrongful death caused by negligence; the *Moragne* remedy applies only to unseaworthiness.

Having concluded that the trial court did not reach an erroneous legal conclusion, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 75-301-Civ-SMA

Margaret W. Ford, as Administratrix and Personal Representative of the Estate of James Edward Ford, Deceased;
Edward F. Ford and the Estate of James Edward Ford, Deceased,

Plaintiffs,

v.

Wallace Wooten, individually, and as father and next friend of August Mark Wooten, a minor, and
American Motorists Insurance Company,

Defendants.

ORDER GRANTING DEFENDANT AMERICAN MOTORISTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT WOOTEN'S MOTION FOR SUMMARY JUDGMENT

November 5, 1980

THIS CAUSE came on to be heard on November 3, 1980, upon cross-motions for summary judgment on Count One of Defendant, Cross-Plaintiff Wallace Wooten's Amended Cross-claim against Defendant, Cross-Defendant American Motorists Insurance Company. The Court has studied the Motions submitted by the parties, their

memoranda of law and the issues raised therein. The Court has also reviewed applicable portions of the Record, specifically including the trial judge's findings of fact and conclusions of law. The Court has studied the Opinion and Mandate of the United States Court of Appeals for the Fifth Circuit in this Cause. From the foregoing, and from the argument of Counsel in open court, the Court concludes that there is no genuine issue of material fact that remains in dispute in this Cause. Thereupon, it is accordingly

ORDERED AND ADJUDGED as follows:

1. Defendant, Cross-Plaintiff Wallace Wooten's Motion for Summary Judgment as to Count One of the Amended Cross-claim is hereby denied.

2. Defendant, Cross-Defendant American Motorists Insurance Company's Cross-motion for Summary Judgment as to Count One of the Amended Cross-claim is hereby granted. The costs of this action are awarded to Defendant, Cross-Defendant American Motorists Insurance Company.

The Amended Cross-claim involved herein stems from Count Two of the Complaint, where is clearly based upon Plaintiff's unseaworthiness claim for recovery against Defendant, Cross-Plaintiff Wallace Wooten. This is so reflected in the trial judge's findings of fact and conclusions of law, which were not challenged upon appeal to the United States Court of Appeals for the Fifth Circuit. Under the unseaworthiness doctrine, underlying negligence is not the basis of liability. It thereupon appears that the American Motorists Insurance Company personal liability insurance policy exclusion for any claims arising out of the Defendant Wallace Wooten's ownership, maintenance, operation or use of a sailboat

more than 26 feet in length applies to this matter and precludes coverage herein.

DONE AND ORDERED at Miami, Florida this 4th day of November, 1980.

/s/ _____
United States District Judge

cc:
Ronald Payne, Esq.
R. O. Holton, Jr., Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
IN ADMIRALTY

Case No. FL-75-301-CIV-PF

Margaret W. Ford, as Administratrix and Personal Representative of the Estate of James Edward Ford, Deceased; for the benefit of ***Margaret W. Ford***, ***Edward B. Ford*** and the Estate of ***James Edward Ford***, Deceased,

Plaintiffs,

v.

Wallace Wooten, individually, and as father and next friend of ***August Mark Wooten***, a minor, and ***American Motorists Insurance Company***,

Defendants.

COMPLAINT

July 1, 1975

COMES NOW the Plaintiffs, Margaret W. Ford, as Administratrix and Personal Representative of the Estate of James Edward Ford, Deceased; for the benefit of Margaret W. Ford, Edward B. Ford and the Estate of James Edward Ford, Deceased, and sue the Defendants, Wallace Wooten, individually, and as father and next friend of August Mark Wooten, a minor, and American Motorists Insurance Company, and allege:

1. This is a matter of admiralty and maritime jurisdiction, as hereinafter more fully appears.

2. This cause of action arises and is maintained by and under Title 46 U.S.C.A. §§ 761-768, otherwise known as the Wrongful Death on the High Seas Act.

3. For all times material to this Complaint, the Defendant, Wallace Wooten, individually, and as father and next friend of August Mark Wooten, a minor, was and is a resident of the State of Florida, and is sui juris.

4. For all times material to this Complaint the Defendant, American Motorists Insurance Company was and is an insurance company qualified and doing business in the State of Florida.

5. For all times material to this Complaint, James Edward Ford, Deceased, was a minor.

6. The Plaintiff, Margaret W. Ford, is the duly appointed, qualified and acting Administratrix of the Estate of James Edward Ford, Deceased, and brings this action for the benefit of the decedent's estate and for the benefit of decedent's survivors, pursuant to Title 46 U.S.C.A. §§ 761-768.

7. For all times material to this Complaint, Margaret W. Ford, and Edward B. Ford were the mother and father, respectively, of James Edward Ford, the deceased minor.

8. For all times material to this Complaint, the Defendant, American Motorists Insurance Company, provided liability insurance on behalf of Defendant, Wallace Wooten and August Mark Wooten, a minor, the proceeds of which would inure to the benefit of Plaintiffs, decedent's estate and decedent's survivors.

9. For all times material to this Complaint, the Defendant, Wallace Wooten, was owner and captain of a sailboat upon which such Defendant, his son, August Mark Wooten, a minor, and the Plaintiff's decedent,

James Edward Ford, a minor, sailed to the Grand Bahama Islands.

10. At the time of the death of Plaintiff's decedent, James Edward Ford, which is the subject matter of this Complaint, the aforementioned sailboat of Defendant, Wallace Wooten, was operating on the high seas, at a distance and course beyond one marine league from the shore of any state of the United States, or any of its several territories.

Count I

Negligence of Wallace Wooten as Temporary Guardian of James Edward Ford

Plaintiff restates and realleges paragraphs 1 through 10 above, and further alleges that:

11. Prior to July 24, 1974, Defendant, Wallace Wooten, contacted Plaintiff, Margaret W. Ford, and requested of her that her minor son, James Edward Ford, be allowed to accompany he and his son, August Mark Wooten, a minor, on a sailboating and skindiving trip on Defendants, Wallace Wooten's, sailboat to the Bahama Islands.

12. Plaintiff, Margaret W. Ford, agreed to allow her minor son to accompany Defendant, Wallace Wooten, and his son, August Mark Wooten, on the aforementioned boating trip into the Atlantic Ocean and allowed Defendant, Wallace Wooten, to assume temporary care, custody and control of her minor child for this purpose.

13. By requesting that the said minor, James Edward Ford, accompany him on said boating trip and by voluntarily assuming temporary custody of said minor, Defendant, Wallace Wooten, expressly and/or impliedly accepted responsibility for the supervision, care and

control and well-being of said minor for the duration of the trip.

14. For all times material to this Complaint, the Defendant, Wallace Wooten, had a duty to exercise reasonable care for the safety and well-being of the minor, James Edward Ford, and, in particular, under the circumstances herein owed a duty to Plaintiffs herein to exercise caution, care and control and to properly supervise the activities of the minor, James Edward Ford, to assure his well-being in connection with the aforementioned sailboating and skindiving trip into the Atlantic Ocean.

15. For all times material to this Complaint, the sailboat owned and operated by Defendant, Wallace Wooten, and utilized by the Defendant for the aforementioned boating trip into the Atlantic Ocean was a dangerous instrumentality.

16. On or about July 24, 1974, Defendant, Wallace Wooten, undertook the custody of the minor, James Edward Ford, Deceased, and with Defendant's minor son, August Mark Wooten, the three parties set off in Defendant, Wallace Wooten's, boat on said trip to the Bahamas, with the intention of engaging in activities which included sailing and skindiving.

17. Thereafter, from on or about July 24, 1974 to August 1, 1974, August Mark Wooten and James Edward Ford, Deceased, engaged in sailing and skindiving in various areas of the Atlantic Ocean in the vicinity of the Grand Bahama Islands within the care, custody and control of the Defendant, Wallace Wooten.

18. On or about August 1, 1974, Defendant, Wallace Wooten, breached his duty to provide care and supervision of the minor, James Edward Ford, by negligently

and carelessly abandoning said minor in foreign waters and returning to the United States, leaving said minor in foreign waters without care, control and supervision.

19. Defendant, Wallace Wooten, deliberately abandoned the minor child whose temporary custody he had voluntarily assumed and allowed said minor child to remain on his boat in the Atlantic Ocean with no adult supervision and in the company of August Mark Wooten, himself a minor, and further allowed James Edward Ford, Deceased, and his minor son to continue the dangerous activities of sailing and skindiving in the Atlantic Ocean without adult supervision and Defendant, Wallace Wooten, knew or should have known, that James Edward Ford, Deceased, and his minor son, August Mark Wooten, would continue engaging in such dangerous activities after he had abandoned his responsibilities and left the two minors without his continuing supervision.

20. Defendant, Wallace Wooten, in abandoning the minor child as set forth in paragraph 19 above, failed to instruct said minor and prohibit said minor from undertaking sailing or diving activities in his absence.

21. Defendant, Wallace Wooten, had a duty to exercise constant care and supervision of James Edward Ford, Deceased, as regards the activities engaged in in the Atlantic Ocean and breached said duty by not requiring that said minor return with him to the United States and further breached said duty by not returning at the earliest possible date to resume care and supervision of the minor, James Edward Ford, Deceased.

22. The aforementioned actions and omissions of Defendant, Wallace Wooten, were done negligently and carelessly and with a reckless disregard for the rights of the decedent, James Edward Ford, and the rights of decedent's survivors.

23. As a direct and proximate result of the negligent and careless abandonment of Defendant, Wallace Wooten's duty to exercise care and supervision of the minor, James Edward Ford, said minor, James Edward Ford, and August Mark Wooten, continued sailing and skindiving in the Atlantic Ocean after the departure of Defendant, Wallace Wooten, and on or about August 5, 1974, James Edward Ford and August Mark Wooten, sailed to the area of Marsh Harbor, Abaco, Grand Bahamas and there located an area of the Atlantic Ocean containing an unusual geographical phenomenon known as "boiling holes" or "roaring holes", an extremely dangerous area for skindiving.

24. Without the adult supervision of Defendant, Wallace Wooten, said minors commenced skindiving at the aforementioned location and at such time on or about August 5, 1974, as a result of Defendant, Wallace Wooten's breach of his duty to provide supervision as aforementioned, James Edward Ford lost his life by drowning while attempting to skindive in said "boiling hole".

25. As a direct and proximate result of the carelessness and negligence of Defendant, Wallace Wooten, as aforementioned, decedent's surviving parents, Margaret W. Ford and Edward B. Ford, have been caused great mental pain and suffering from the date of the death of their minor child to the present and will continue in the future to suffer great pain and mental suffering. Further, decedent's surviving parents, Margaret W. Ford and Edward B. Ford, have been deprived of the value of lost support and services from the date of Decedent's death to the present and will continue in the future to be deprived of the support and services of their minor child.

26. As a further direct and proximate result of the carelessness and negligence of the Defendant, Wallace Wooten, as aforementioned, the Estate of James Edward Ford, Deceased, has been deprived of the present value of the net accumulations that decedent would have made to his estate had he lived out his life. Further, decedent's estate has become liable for funeral expenses by reason of the death of decedent.

27. The death of James Edward Ford was caused by the wrongful act, neglect, default and carelessness of the Defendant, Wallace Wooten, and August Mark Wooten, his minor son, as hereinbefore delineated, and such act, neglect, default and carelessness was such as would have entitled James Edward Ford, if death had not ensued, to maintain an action against and to recover damages from the Defendants in respect thereof.

Count II

Negligence of Wallace Wooten as Captain of Sailing Vessel

Plaintiff restates and realleges paragraphs 1 through 27 above, and further alleges that:

28. As captain of the aforementioned sailboat, Defendant, Wallace Wooten, had a positive duty to supervise, control, direct, instruct and care for the crew of such sailing vessel when it was engaged in any function directly or indirectly relating to operation and maintenance of said vessel, including but not limited to, the procuring of food for crew.

29. On or about August 1, 1974, Defendant, Wallace Wooten, breached his duty, as captain of said sailboat, to supervise, control, direct, instruct and care for the crew of such sailing vessel when engaged in any function or operation upon the high seas or in foreign waters, by

negligently and carelessly abandoning said sailboat while it was in foreign waters, and returning to the United States; leaving said sailboat in the sole and complete possession, control and supervision of his untrained and unskilled crew, consisting of Plaintiffs' decedent, James Edward Ford, a minor, and Defendant, Wallace Wooten's minor son, August Mark Wooten.

30. As the result of the absence of the supervision and direction of Defendant, Wallace Wooten, captain of said sailboat, the crew thereof, consisting of August Mark Wooten, a minor, and Plaintiffs' decedent, James Edward Ford, similarly a minor, undertook the dangerous and hazardous sailing and skindiving activities to secure food as delineated in paragraphs 23 and 24 above; the direct and proximate result of negligence of Defendant, Wallace Wooten, was the death by drowning of James Edward Ford, while attempting to procure food for the crew.

WHEREFORE, Plaintiff demands judgment for compensatory damages against Wallace Wooten, individually, together with interest accrued from the date of the accident in question, costs, attorney's fees and such further relief as may be proper, and demands trial by jury of all issues triable as of right by jury.

Count III

Negligence of August Mark Wooten

Plaintiff restates and realleges paragraphs 1 through 27 above, and further alleges that:

31. The Defendant, Wallace Wooten, is the natural father and duly appointed, qualified and acting guardian and next friend of and for the person and property of August Mark Wooten.

32. When August Mark Wooten and Plaintiffs' decedent, James Edward Ford, reached the aforementioned

"boiling hole" or "roaring hole", and determined to go skindiving, said minors agre[illegible] to and utilized the "buddy system", a method employ[illegible]d by divers, wherein diving is done in pairs, and each member of each diving pair monitors all activities of his counterpart, his "buddy", as a safety precaution.

33. Thereafter, August Mark Wooten, negligently and carelessly failed to properly utilize the "buddy system" by failing to keep a proper look-out, and failed to exercise reasonable care to monitor the activities of James Edward Ford, Deceased, as the two minors were skindiving in the aforementioned "boiling hole".

34. As a direct and proximate result of the carelessness and negligence of August Mark Wooten, as alleged above, James Edward Ford lost his life by drowning while skindiving in said "boiling hole".

WHEREFORE, Plaintiff demands judgment for damages against August Mark Wooten, by and through his father and next friend, Wallace Wooten, together with interest accrued from the date of the accident in question, costs, attorney's fees and such further relief as may be proper, and demands trial by jury of all issues triable as of right by jury.

Count IV

Negligence of Wallace Wooten as Temporary Guardian of James Edward Ford – in the Alternative

Plaintiff restates and realleges paragraphs 3 through 5, and 7 through 27, and further alleges that:

35. This is an action for damages in excess of $2,500.00 for wrongful death pursuant to Florida Statutes 768.16 through 768.27, otherwise known as the Florida Wrongful Death Act.

36. The Plaintiff, Margaret W. Ford, is the duly appointed, qualified and acting Administratrix of the Estate of James Edward Ford, Deceased, and brings this action for the benefit of the decedent's estate and for the benefit of decedent's survivors, pursuant to Florida Statutes 768.16 through 768.27, otherwise known as the Florida Wrongful Death Act.

Count V

Negligence of Wallace Wooten as Captain of a Sailing Vessel

Plaintiff restates and realleges paragraphs 3 through 5; paragraphs 7 through 10; paragraphs 28 through 30; and, paragraphs 35 and 36.

WHEREFORE, Plaintiff demands judgment for compensatory and punitive damages against Wallace Wooten, individually, together with interest, costs, attorney's fees, and such further relief as may be proper, and Plaintiff demands trial by jury of all issues triable as of right by jury.

Count VI

Negligence of August Mark Wooten

Plaintiff restates and realleges paragraphs 3 through 5; paragraphs 7 through 10; and, paragraphs 31 through 36.

WHEREFORE, Plaintiff demands judgment for damages against August Mark Wooten, by and through his father and next friend Wallace Wooten, together with interest, costs, attorney's fees and such further relief as may be proper, and demands trial by jury of all issues triable as of right by jury.

/s/ Margaret W. Ford, as Administratrix
and Personal Representative of the
Estate of James Edward Ford,
deceased.

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By /s/ Jon E. Krupnick

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 76-2079

MARGARET W. FORD, *ET AL.*,
Plaintiffs-Appellees,

v.

WALLACE WOOTEN, *ETC.*,
Defendant-Appellant,

v.

AMERICAN MOTORISTS INSURANCE COMPANY,
Defendant-Appellee.

STIPULATION AND ORDER OF APPROVAL

The parties hereto, by and through their undersigned counsel, hereby stipulate and agree that the Trial Court, at the Pre-Trial Conference held on October 28, 1975, granted the Motion of Margaret W. Ford., etc., et al., to Amend the Complaint to include a claim for damages under the General Maritime Law, said Motion having been filed with the Court on October 20, 1975.

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By: /s/
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By: /s/
Attorney for
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ORDER

The Court hereby certifies that the Court did, in fact, grant the Motion of Margaret W. Ford, etc., et al., to Amend her Complaint to include a claim for damages under the General Maritime Law, as recited above.

[Signature]

September 15, 1976

82-800

Supreme Court, U.S.
FILED
JAN 14 1983
L. STEVAS
CLERK

No. A-382

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WALLACE WOOTEN,

Petitioner,

v.

AMERICAN MOTORISTS INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are "loss of society" damages awarded under *Moragne v. United States Lines, Inc.*, 398 U.S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970), based upon the unseaworthiness of a vessel, covered by a policy of homeowner's insurance which excludes liability for damages arising out of the operation, maintenance or use of the vessel in question?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, AMERICAN MOTORISTS INSURANCE COMPANY (hereinafter AMERICAN MOTORISTS), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 681 F.2d 712.

STATEMENT OF THE CASE

The Respondent has no quarrel with the Petitioner's recitation of the facts regarding the incident which precipitated the wrongful death action against WOOTEN and AMERICAN MOTORISTS. However, the procedural aspects of this case should be clarified.

The original six count Complaint (Appendix C to the Petitioner's Brief) relied upon the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. § 761 (hereinafter DOSHA), as a basis for relief. Although originally framed in six counts, Counts III through VI were dismissed and the action proceeded on Counts I and II. Count I sought damages based upon WOOTEN's negligence as "temporary guardian" of the deceased and Count II sought damages from WOOTEN as "captain of a sailing vessel". Subsequently, over AMERICAN MOTORISTS' objection, Count II was amended to seek "loss of society" damages under *Moragne*.

Florida law permits the joinder of an insurance company as a named party and further requires that, if any of the claims presented are covered by the policy of insurance, the insurance carrier is obligated to defend the entire action. AMERICAN MOTORISTS did so in this case, admitting coverage for the personal negligence of WOOTEN but denying coverage for damages arising out of the operation, maintenance or use of the vessel based upon the policy exclusion. The case proceeded to trial on the two aforementioned theories and, following the non-jury trial, the original Trial Court entered two Final Judgments.

The Trial Court found WOOTEN liable under Count I and found coverage under the AMERICAN MOTORISTS' homeowner's policy. Accordingly, a Final Judgment

was entered against AMERICAN MOTORISTS for "pecuniary loss" damages under DOSHA (Count I). In addition, the original Trial Court found that the vessel was unseaworthy as a result of the incompetency of the crew and further found that there was no coverage under the homeowner's policy of insurance issued by AMERICAN MOTORISTS based upon the applicability of the aforementioned exclusion. A second judgment was entered against WOOTEN for total damages which included the "pecuniary losses" under DOSHA and "loss of society" damages under the *Moragne* remedy. Both judgments have been satisfied, AMERICAN MOTORISTS paying the DOSHA damages and WOOTEN paying the "loss of society" damages.

In his first appeal, WOOTEN did *not* challanege any of the Court's findings as they related to the applicability of the *Moragne* remedy, the status of the deceased as a crew member, the unseaworthiness of the vessel or the applicability of the policy exclusion. WOOTEN did, however, seek to attack the judgment entered against AMERICAN MOTORISTS saying that it should have included the award for "loss of society" damages under *Moragne*. WOOTEN also challenged the Court's denial of his Motion for Leave to File a Cross-claim in the lower Court.

The Fifth Circuit Court of Appeals, recognizing the problems with WOOTEN's standing to appeal a judgment not entered against him, remanded the case to the Trial Court for a determination on the insurance coverage issue, recognizing that WOOTEN had not challenged any of the findings of the Trial Court.

On remand, WOOTEN added nothing to the record that would in any way affect the coverage issue and, accordingly, the Trial Court, via Summary Judgment, affirmed the finding of no coverage for damages based

on unseaworthiness (Appendix B to Petitioner's Brief). In the interim, this Honorable Court decided *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 617, 56 L. Ed. 2d 339, 98 S. Ct. 2010 (1978), and held that the DOSHA was the exclusive remedy for losses occurring outside of territorial waters such as the loss involved at the case at bar.

REASONS WHY THE WRIT SHOULD BE DENIED

There are at least three reasons why the Petition should be denied.

A. The Record Does Not Raise The Question Presented In The Petition.

The sole Question Presented by the Petition is whether the *Moragne* remedy is limited to breaches of the warranty of seaworthiness or whether it is "also available" in cases involving negligence unconnected with the operation of a vessel. The Question Presented in the Petition omits reference to the fact that the death in question occurred in the Bahamas beyond the territorial waters of the United States.

From the pleading stage forward, the Plaintiff below (not a party to this appeal) proceeded on two separate and distinct theories for recovery. The original Trial Court found for the Plaintiff, holding that WOOTEN was guilty of personal negligence and also that his vessel was unseaworthy at the time of the incident in question. The award for "loss of society" (the only award in dispute) was made in conjunction with the finding of unseaworthiness. AMERICAN MOTORISTS' policy was one of homeowner's insurance excluding liability coverage for damages arising out of the operation, maintenance

or use of a watercraft and the Trial Court found that policy exclusion applicable to the damages based on unseaworthiness. On remand, WOOTEN sought review of that holding via cross-claim and, as the Eleventh Circuit Court of Appeals pointed out at 681 F.2d 713: "The issue presented by the cross-claim is one of coverage under a homeowner's insurance policy issued to Wooten by American." Thus, the issue is one of insurance coverage and resolution of the issue does not depend on what theories are "available".

It is academic whether the *Moragne* award was based on unseaworthiness or negligence since the Judge found unseaworthiness and WOOTEN has never challenged that finding. WOOTEN had argued to the Eleventh Circuit that the Judge had ruled *as a matter of law* that the general maritime law *only* permitted wrongful death actions based on unseaworthiness. In their opinion, the Eleventh Circuit pointed out that: "We question whether an issue concerning the theoretical basis for the judgment entered between Wooten and the original plaintiff is now before us." 681 F.2d at 714. WOOTEN contended that certain language used by the Trial Court indicated the Court's feeling that the general maritime recovery hinged upon the unseaworthiness of the vessel. The Eleventh Circuit went on to point out that: "The court's oral findings are susceptible to alternative interpretation—the court may have found that the *facts* of this case did not support a general maritime law recovery for wrongful death caused by negligence." 681 F.2d at 715.

Finally, WOOTEN took the position that the Trial Court's finding of negligence under Count I should be applicable to the general maritime claim. That issue was *not* decided by the Eleventh Circuit, 681 F.2d at 715, footnote 2, since to do so would be to eliminate

WOOTEN's liability under Count II without the appropriate appellate challenge.

Had WOOTEN ever challenged any of the Trial Court's findings of fact, and particularly the finding that his vessel was unseaworthy, then the question presented might be relevant. However, absent such a challenge, the finding of unseaworthiness stands and the damages awarded are properly excluded by the terms of the AMERICAN MOTORISTS Insurance Policy.

B. An Affirmative Answer To The Question Presented Would Not Change The Result Of This Case.

As previously pointed out, this is a case of insurance coverage and the vessel in question was found to have been unseaworthy giving rise to the disputed damages for "loss of society". The fact that these damages could have been awarded under a different theory is irrelevant absent of showing that the award was improperly made. Certainly, WOOTEN does not argue to this Court that the "loss of society" damages under *Moragne* could *not* have been based on unseaworthiness. Therefore, even if it were to be held that *Moragne* applies in a non-maritime context, the result in this case would be the same.

C. The Opinion By The Eleventh Circuit Court Of Appeals Is Consistent With Admiralty Jurisprudence As Announced By This Court.

The specific holding of the Eleventh Circuit Court was that: ". . . where a cause of action exists for wrongful death under DOSHA, no additional adtion exists under general maritime law for wrongful death caused by

negligence; the *Moragne* remedy applies only to unseaworthiness." 681 F.2d at 716-717.

It is respectfully submitted that this holding is consistent with *Moragne* and *Mobile Oil Corporation v. Higginbotham*, 436 U.S. 617, 56 L. Ed. 2d 339, 98 S. Ct. 2010 (1978), and the Petition fails to disclose the existence of any case on point to the contrary. Even though the Eleventh Circuit did not rely on *Mobil Oil*, the end result is and should remain unchanged.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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